

98TH CONGRESS 2d Session	HOUSE OF REPRESENTATIVES	REPORT 98-905
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## RECORDING OF TELEPHONE CONVERSATIONS BY FEDERAL OFFICERS AND EMPLOYEES

JULY 25, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary,  
submitted the following

### REPORT

together with

### DISSENTING VIEWS

[To accompany H.R. 5873]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5873) to amend chapter 93 (relating to public officers and employees) to title 18 of the United States Code to forbid the recording by Federal officers and employees of telephone conversations without the consent of all parties to such conversations, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

#### PURPOSE

The legislation makes it a Federal crime for Federal officials and employees to record a telephone conversation without the consent of all parties to the conversation.

#### BACKGROUND AND NEED FOR LEGISLATION

The surreptitious taping of confidential conversations by government officials has been brought to the attention of the American public with increasing frequency over the last two decades. As the equipment used for secret taping becomes simpler, less expensive

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and more readily available, the temptation to tape becomes too great for some to resist.

Secret taping is not, however, an acceptable form of conduct for public officials. The issue is not a violation of privacy, such as occurs with wiretapping or eavesdropping, since the person talking is aware that the public official is listening. Rather, such taping involves a breach of trust. It interferes with the respect and confidence that depends on shared assumptions about how a person will treat what another says. See testimony of Professor Herman Schwartz, Hearings on Nonconsensual Recording of Telephone Conversations before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 26 (1984) [hereinafter cited as "Hearings"]. Americans are so uniformly in agreement that nonconsensual taping is outrageous that they already assume that such taping is a serious offense in violation of Federal law. See testimony of Senator Dale Bumpers, *id.* at 20

Moreover, secretly taped conversations can easily be misinterpreted and misused. As noted by Professor Leon Freidman,

Telephone conversations are an extremely private experience. People may say things on the telephone which are confidential, revealing and embarrassing. They may lie, exaggerate or act out certain notions in their minds. The words they use take on an entirely different meaning if reduced to a cold written record later on. If everything they say is recorded without their knowledge, it is a serious affront to their privacy and dignity.

Hearings at 49.

Surreptitious taping by government officials is particularly undesirable. Government officials are often in a more knowledgeable position than the parties to whom they are speaking. Conversations secretly recorded by government officials can be used either to protect the official with a record of self-serving statements undisputed by others or to obtain embarrassing admissions or gossip from another party which can be used to advantage later. See testimony of Professor Leon Friedman, *id.* at 50. It is inexcusable that a government official, with the full power of the State behind him and with the ability to steer the conversation into areas that will benefit him and injure the other party, should be allowed to exploit that situation.

The special concern about secret taping by persons in positions of greater power is reflected in the American Bar Association position on such taping by lawyers: Secret recordings are in conflict with requirements that the conduct of lawyers be characterized by "candor and fairness" and are, therefore, unethical. ABA Informal Opinion No. 1009 (10/16/67). This position was reiterated in ABA Formal Opinion No. 337 (1974), which termed secret taping of conversations with other lawyers and with clients to be unethical. The only exception is secret recording of witnesses in criminal proceedings.

Nonconsensual taping by parties to conversations is not at present a violation of Federal law.<sup>1</sup> Section 2511 of title 18 prohibits the "interception" of wire or oral communications. However, subsection (2)(c) of that section specifically provides that persons acting under color of law can "intercept" their conversations without informing other parties to the conversation if they are a party or have the consent of a party. Persons not acting under color of law may similarly intercept their conversations as long as the purpose of the interception is not to commit any "criminal or tortious act in violation of the Constitution and laws of the United States or any State or for the purpose of committing any other injurious act." 18 U.S.C. 2511(2)(d).

Moreover, it is questionable whether 18 U.S.C. 2511 applies at all to taping. "Intercept" is defined in 18 U.S.C. 2510 as the "aural" acquisition of the contents of a communication. Aural, however, means "of or relating to the ear." See testimony of Magistrate James Carr, Hearings at 38. Courts applying section 2511 have disagreed on the question of whether recording by a participant constitutes "interception" under the statute. See *Flaherty v. Arkansas*, 415 U.S. 995, 997 (1974) (dissent from denial of certiorari by Douglas, J.) (recording by participant an interception); *United States v. Shields*, 675 F.2d 1152, 1156 (11th Cir. 1982) (interception); *United States v. Turk*, 526 F.2d 654, 657 (5th Cir. 1976) (interception); *United States v. Harpel*, 493 F.2d 346, 350 (10th Cir. 1974) (not an interception). It has been held that "interception of a phone call necessarily involves the idea that the speaker thinks he is talking to one person whereas in fact a third person is listening." *Billeci v. United States*, 184 F.2d 394, 397 (D.C. Cir. 1950).

Under the *Billeci* interpretation, therefore, a party to a conversation who is also secretly taping that conversation is not "intercepting" the conversation and is not subject to any of the prohibitions of section 2511. If that interpretation is correct, Federal statutes fail to limit nonconsensual taping of phone conversations in any way.<sup>2</sup>

General Services Administration regulations promulgated in response to the Omnibus Crime Control and Safe Streets Act of 1968 and the Foreign Intelligence Surveillance Act of 1978 do, however, severely limit the taping of phone conversations within the Federal Government. Taping of phone conversations, even with the consent of one of the parties, is prohibited except (a) for law enforcement purposes, (b) for counter-intelligence purposes, (c) for public safety purposes, (d) by a handicapped employee or, (e) by a Federal agency for service monitoring. 41 CFR § 101-37.311-1—37.311-3.

The Committee has concluded that the G.S.A. regulation alone is insufficient as a bar to nonconsensual taping. In testimony (before the House Government Operations Committee) on H.R. 4620, legislation to prohibit nonconsensual taping introduced by Representa-

<sup>1</sup> Twelve States do prohibit nonconsensual taping: California, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington.

<sup>2</sup> "In the final analysis, the better approach is probably to consider participant recording as interception. This approach implements the basic policy of Title III to regulate expansively and comprehensively, and to provide maximum protection to conversational privacy."

J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* § 3.02[3][b][iv] (Supp. 1983).

tive Jack Brooks, United States Information Agency Director Charles Z. Wick responded to questions concerning newspaper articles revealing his habit of secretly taping his phone calls. Before beginning this practice Mr. Wick discussed its legality with counsel, and made a decision to tape nevertheless. He told the Government Operations Committee that

What I did was a violation of a General Services Administration Property Management Regulation. While I believe I am now more sensitive to the importance of such a regulation, the fact remains that what I did was not illegal—not in violation of law. Had your bill been in place at that time, I can assure you I would have been more attentive to the issue.

In summary, the Committee has determined that

Nonconsensual taping is a very undesirable practice, the equivalent of being an electronic "Peeping Tom;" it is a breach of trust and confidence that chills freedom of speech and association.

Nonconsensual taping by government officials is particularly undesirable because such individuals operate from a position of greater power and knowledge;

Federal law does not address the question of nonconsensual taping adequately and, according to some courts, does not address the question at all; and

GSA regulations restricting the use of secret taping are largely ignored, and are unequal to the task of preventing that taping.

#### H.R. 5873, AS REPORTED

H.R. 5873 is intended to reduce the incidence of nonconsensual taping in situations wherein such taping constitutes a betrayal of trust. It does not apply to situations in which taping is done with the knowledge and consent of all of the parties to the conversation.<sup>3</sup> The Committee recognizes that certain persons and agencies have a recognized need to tape secretly. The bill therefore exempts from coverage persons engaged in legitimate law enforcement activities, persons carrying out intelligence or counterintelligence work, persons who are required under the Federal Rules of Criminal Procedure to tape search warrant requests made by telephone, and persons taping incoming calls received on publicly established emergency (911) numbers.

The Committee believes the prohibitions created by this legislation to be narrow and the exceptions appropriate. H.R. 5873 does not prohibit anyone from taping a telephone conversation, as long as all parties to the conversation consent. Taping of the conversation becomes criminal only if done without consent. Routine man-

<sup>3</sup> Consistent with trade practice, certain telephone calls to and from the TVA Power System's Load Control Center, dispatching offices, and Emergency Operations Center are recorded to assure accuracy of critical oral instruction, preserve an accurate record of contracts, and establish an accurate record of events in an emergency situation. The persons whose calls are recorded are aware of, and by carrying out their duties consent to, this practice. Thus, the legislation would not restrict such recording.

agement or personnel taping, for example, could continue with the permission of the parties to the conversations. Even where there is no consent, however, taping would not be criminal if it fell within one of the four exemptions in the bill.

#### SECTION-BY-SECTION ANALYSIS

##### SECTION ONE

Section one of the bill adds a new section 1924 ("Nonconsensual recording of telephone conversations") to chapter 93 ("Public officers and employees") of title 18, United States Code. Subsection (a) of new section 1924 would prohibit the taping of a telephone call by a Federal official or employee unless all parties to the conversation consented to the recording. The punishment provided for the offense is a fine of up to \$100,000, imprisonment for not more than one year, or both.

Subsection (b) of new section 1924 provides for exemptions from the application of the section. Subsection (b)(1) exempts Government officials and employees empowered to investigate and make arrests for criminal offenses who are engaged in law enforcement activities. Subsection (b)(2) exempts persons engaged, pursuant to the Foreign Intelligence Surveillance Act, in foreign intelligence or counter-intelligence work.

Subsection (b)(3) of new section 1924 exempts routine taping of search warrant requests received over the telephone, as required by the Federal Rules of Criminal Procedure. Finally, subsection (b)(4) exempts the recording of incoming calls to report emergencies to numbers publicly established to receive emergency calls, if such recordings are made in the usual course of duty and if the appropriate agency determined that nonconsensual recordings of such calls would be in the public interest.

##### SECTION TWO

Section two of the bill amends the table of sections of chapter 93 of title 18 of the United States Code to add the catchline of new section 1924.

##### SECTION THREE

Section three of the bill provides that the effective date of the legislation is 90 days after the date of enactment.

##### OVERSIGHT FINDINGS

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to this Committee by the Committee on Government Operations.

##### NEW BUDGET AUTHORITY

In regard to clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 5872 creates no new budget authority or increased tax expenditures for the Federal Government.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no inflationary impact on prices or costs in the operation of the national economy.

FEDERAL ADVISORY COMMITTEE ACT OF 1972

The Committee finds that this legislation does not create any new advisory committee within the meaning of the Federal Advisory Committee Act of 1972.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 3, 1984.*

Hon. PETER W. RODINO, Jr.,  
*Chairman, Committee on the Judiciary, House of Representatives,  
Rayburn House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5873, a bill to amend chapter 93 (relating to public officers and employees) of title 18 of the United States Code to forbid the recording by federal officers and employees of telephone conversations without the consent of all parties to such conversations, as ordered reported by the House Committee on the Judiciary, June 26, 1984. We estimate that no significant cost to federal, state, or local governments will result from enactment of this bill.

H.R. 5873 provides that federal officials and employees who, in the course of their employment, record a telephone conversation without the consent of all parties to the conversation, would be fined up to \$100,000, imprisoned for up to one year, or both. The bill also outlines certain exceptions to these procedures. The bill's provisions would take effect 90 days after enactment.

Based on information from the Department of Justice, we expect that few prosecutions, and hence, no significant cost to the federal government, would result from enactment of H.R. 5873. The magnitude of the revenues from fines imposed by the bill cannot be estimated at this time.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER.

COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office and estimates that the enactment of this legislation will not result in significant cost to Federal, State, or local governments.

COMMITTEE VOTE

The Committee reported H.R. 5873 on June 26, 1984, by a vote of 18 to 10.

CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

\* \* \* \* \*

PART I—CRIMES

\* \* \* \* \*

CHAPTER 93—PUBLIC OFFICERS AND EMPLOYEES

Sec.

1901. Collecting or disbursing officer trading in public property.

\* \* \* \* \*

1924. *Nonconsensual recording of telephone conversations.*

\* \* \* \* \*

***§ 1924. Nonconsensual recording of telephone conversations***

*(a) Except as provided in subsection (b) of this section, whoever, holding office or employment in the Federal Government, makes in the course of such office or employment a sound recording of a voice conversation taking place on a telephone, without the consent of all parties to that conversation, shall be fined not more than \$100,000 or imprisoned not more than one year, or both.*

*(b) This section does not apply to a recording made by an individual—*

*(1) who is empowered by law to conduct investigations of or make arrests for criminal offenses while such individual is engaging in such an investigation or arrest;*

*(2) engaged in foreign intelligence or counterintelligence work;*

*(3) of a telephone search warrant request as required under the Federal Rules of Criminal Procedure; or*

*(4) in the usual course of duty of an incoming call to report an emergency to a number publicly established for emergency calls, if the appropriate agency has determined that the public interest requires that such recordings be made.*

\* \* \* \* \*

DISSENTING VIEWS OF MR. GEKAS, MR. FISH, MR. McCOLLUM, MR. LUNGREN, MR. SHAW, MR. SENSENBRENNER, AND MR. MOORHEAD

The agenda of any Congress, limited by the press of time and affairs, should concentrate on matters of genuine federal significance. Every item seeking a place on that agenda should be weighed carefully on a priority scale calibrated by the common good and how best to attain it. So measured, H.R. 5873 is clearly wanting.

H.R. 5873 attaches criminal penalties to the recording of telephone conversations by government employees without the consent of every party to that conversation. The bill is unnecessary, illogical and squanders scarce law enforcement resources on what may be a nonexistent problem.

H.R. 5873 is unnecessary because federal criminal law already prohibits non-consensual recording of telephone conversations when done "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act" (18 USC 2511(2)(d)). This prohibition applies to everyone. As to employees of the federal government, GSA regulations prohibit the taping of telephone conversations without the consent of all parties. 41 CFR 101-37.311.

The bill is illogical not only because it singles out federal government employees but also because it inexplicably restricts its scope to telephone recordings. If recording is a practice so nefarious that it merits criminal sanctions, these sanctions should be applied to everyone regardless of whether or not they are government employees. In addition, and without a doubt, such a law should cover the wide variety of other recording situations such as those involving hidden microphones and eavesdropping devices.

The bill is a gross misallocation of law enforcement resources to a "problem", the dimension or even the existence of which no one has been able to document. Millions of federal government employees would be liable to scrutiny if such a bill is to be seriously implemented—an enforcement nightmare that can only cause one to whistle in wonder. To protect society from predation, government must obviously criminalize certain conduct that jeopardizes that society. But it cannot criminalize all conduct—it must necessarily be restrained by its enforcement capability to that of a significantly injurious nature.

A cresting crime wave is bearing down on America and people know what protection is most urgently needed. They demand action to reduce drug traffic, to develop realistic bail practices, to inject consistency into sentencing and to otherwise restore the balance between law enforcement and the criminal. The need for meaningful action is acute. The country knows it, the Administra-



tion has proposed action and the Senate has taken action. However, the House waits.

While society wages a desperate war on crime, H.R. 5873 proposes to withdraw law enforcement resources from the front line and reassign them to watch other government officials—not because of any widespread illegality, not because it will further the combat of crime, but only as response to the indiscretion of one government official who has already been adequately requited at the public pillory.

Ultimately this Congress must account to the American people for the time spent discharging the public trust. It must explain what it has accomplished to make streets safer, to make homes more secure, to protect youth from drugs and to otherwise promote a peaceful society. To a discerning and demanding public, the passage of H.R. 5873 would indicate that Congress has wasted that time.

For these reasons we respectfully dissent.

GEORGE W. GEKAS  
DANIEL E. LUNGREN  
HAMILTON FISH, JR.  
CARLOS J. MOORHEAD  
E. CLAY SHAW, JR.  
BILL MCCOLLUM  
F. JAMES SENSENBRENNER, JR.